

U.S. DEPARTMENT OF STATE
HAGUE CONVENTION ON INTERCOUNTRY ADOPTION; INTERCOUNTRY ADOPTION
ACT OF 2000; PROPOSED RULES FOR ACCREDITATION OF
AGENCIES, APPROVAL OF PERSONS, AND PRESERVATION OF
CONVENTION RECORDS

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An anxious couple, close friends of mine, boarded the plane for Estonia. For weeks, they had memorized the face of their child, planned the details of the nursery, and deliberated over the name that they would bestow upon their second child. The couple had one biological child, and desperately wanted to have another. However, after trying for years to become pregnant, they decided adoption would be the best avenue to pursue. They consulted several agencies, and settled on one after pouring through informational pamphlets and doing their own research. They never retained a lawyer. Eventually they found themselves peering out of an airplane window and landing in Estonia in hopes of bringing home a sibling for their daughter waiting back home. When they went to hold their child, they realized something was wrong. The child was severely brain-damaged and would never recover. The couple left Estonia, the mother crying, clutching the weathered picture of a healthy infant to her chest. They sued the agency facilitator, and received

monetary compensation for their compensatory damages. Their hearts remain broken, however. Their perspective on adoption was not just one of a simple contractual duty gone askew; rather, their family suffered a horrific loss from which they are still recovering.

INTRODUCTION

I respectfully submit this comment in response to the notice of proposed rulemaking which appeared in the Federal Register on September 15, 2003, Volume 68, Number 178. I am a student enrolled at Villanova University School of Law, and I hope to pursue a career in family law. I write and submit this comment solely on my own behalf as a result of my personal interest in the issues at hand and also because I know families who have been directly affected by the lack of regulations in the arena of international adoption. Thus, this comment reflects only my personal interests, ideas, and conclusions, and not those of Villanova University School of Law. I believe the United States is acting appropriately in deciding to become a party to the 1993 Hague Convention and implementing legislation through the Intercountry Adoption Act of 2000 ("IAA") (PL106-279). However, I have some concerns and questions regarding the manner in which the purposes of the Convention will correspond with the proposed rules set forth in the Federal Register. I appreciate the opportunity to write and submit my comments to the U.S. Department of State.

In my comment, I address the following five areas of concern:

- I. Effects of the Proposed Rules Based on the Ruling From Nancy G. et al. v. Department of Children and Families 733 A.2d 136 (Conn. 1999)
- II. Difficulties Facing Prospective Parents in Accessing Information Regarding Non-Conforming Entities and Unethical Behaviors Taking Place Within Those Entities
- III. Effects of the Absence of Regulations Regarding "Excluded Adoption Services" on the Proposed Rules

- IV. Need for Improved Communication Between Accrediting Entities and Agencies/Persons Seeking Accreditation/Approval Can be Facilitated by an Appointed Representative From Each Accredited or Approved Entity
- V. Need to Address the Safety Concerns of Parents Traveling to Foreign Countries to Pick up Their Adopted Child

BACKGROUND

The United States seeks to become a party to the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption. The United States became a signatory to the Convention on 31 March 1994. Through the implementation of the Intercountry Adoption Act (IAA) of 2000, the United States has created legislation to ratify its signature to this Convention. The proposed rules note that non-profit entities seek "accreditation" and are referred to as "agencies;" for-profit, private entities seek "approval" and are referred to as "persons." The U.S. Department of State notes that the Convention does not come into force for the United States until the United States is able to meet its obligations under the Convention and the U.S. deposits the ratification. Thus, timing is a factor of importance, since the United States has undertaken the great duty of accrediting and approving U.S. adoption entities. The accreditation/approval process must be diligent and thorough, but also well-organized and efficient. I address the following five points with this consideration in mind.

The proposed rules aim to set up a system of accreditation and approval for adoption agencies and persons. The proposed rules can be strengthened by requiring agencies and persons to address education for prospective adoptive parents and by focusing on communication between adoption agencies/persons and parents. Though the goal of the proposed rules is to set forth the accreditation/approval system, rule-makers must also account for the people who will ultimately feel the rules' effects - parents and children.

I. Nancy G. et al. v. Department of Children and Families

The case of Nancy G. presents questions that the proposed rules do not answer. Specifically, this case speaks to a troubling situation that adoptive parents might face subsequent to the adoption proceedings. In 1999, the Supreme Court of Connecticut decided this case concerning the request of a mother, Nancy G., for post-adoption subsidy for her special needs child, Jonathan, whom she adopted from India in March of 1982. The court decided that Nancy was not entitled to the requested subsidy pursuant to the General Statutes §§ 17a-116 and 17a-117. 733 A.2d at 139.

General Statutes § 17a-116 provides in relevant part:

"[A] 'special needs' child is a child who is a ward of the Commissioner of Children and Families or is to be placed by a licensed child-placing agency and is difficult to place in adoption because of one or more conditions including, but not limited to, physical or mental disability, serious emotional maladjustment, a recognized high risk of physical or mental disability, age or racial or ethnic factors which present a barrier to adoption or is a member of a sibling group which should be placed together, or because the child has established significant emotional ties with prospective adoptive parents while in their care as a foster child and has been certified as a special needs child by the Commissioner of Children and Families." Id.

On appeal, the court determined that because Jewish Family Services of New Haven, Inc. did not "place" Jonathan for adoption, his mother was not entitled to the post-adoption subsidy she sought. Id. Rather, Americans for International Aid and Adoption was the agency that had placed Jonathan. Id. at 141. To receive the subsidy she requested, Jonathan must have been "placed" for adoption by a child-placing agency licensed in Connecticut. Id. (emphasis added). The trial court concluded that Americans for International Aid and Adoption, located in Michigan and not licensed in Connecticut, "placed" Jonathan. Id. at 141-42. The Connecticut Supreme Court affirmed. Thus, Jonathan and his mother could not receive the subsidy he so desperately needed.

Parents who apply for post-adoption subsidies face challenges in navigating the legal system since the state statutes decide

which agency or person "placed" the adopted child for purposes of granting or denying the parents' request for subsidies. Since the State Supreme Courts give deference to the construction of the statute applied by the administrative agency, I am concerned for the implications of the proposed rules on post-adoption subsidy requests.

This case presents the question of what happens to families who have worked with more than one adoption agency in their attempt to adopt a child. Under the statute, the Connecticut Supreme Court had to decide which agency "placed" Jonathan for purposes of awarding or denying a post-adoption subsidy. What would happen if, in this same situation, the court not only had to decide which agency "placed" the child with the adoptive parents, but also had to figure out how "accredited" or "approved" agencies would be treated in their determination of awarding or denying request for post-adoption subsidies? Consider how the proposed regulations propose more questions than answers within these hypothetical examples:

Example 1: Suppose Accredited Agency "A" worked with Non-accredited Agency "B" in placing a child from a member of the 1993 Hague Convention with an American family. What would happen if the American family later requested a subsidy for their adopted child? Would the family be denied the subsidy if the state statute was interpreted so that Non-accredited Agency "B" "placed" the child, so relief under the regulations was not possible?

The proposed rules do not speak directly to this problem. One could draw several conclusions from example 1. On the one hand, the American family could be denied the requested subsidy for their child since the agency which placed the child was not one of the accredited (or temporarily accredited) agencies. On the other hand, the family could be granted the requested subsidy because the accredited agency acted equally in placing the child with the adoptive parents. The rules are silent as to how (and if) the interpretation of state statutes affect the award and denial of post-adoption subsidies. If an accredited agency aided in placing the child with his or her adoptive family, I suggest that this fact should be taken into consideration when construing state statutes for awarding subsidies.

Example 2: Further consider what might happen if one supposed that Accredited Agency "A" transferred the child to Approved Person "B" who "placed" the child with the American adoptive family. Would a family requesting a post-adoption subsidy be granted it? This hypothetical raises the question of whether approved persons carry the same effect as accredited agencies regarding placement under the specific state statutes.

The proposed rules are silent whether approved persons and accredited agencies affect the courts' decisions to grant or deny subsidies. Although states have the authority to promulgate and interpret their own statutes, I suggest that the proposed rules speak to this issue. If the rules address the role that accredited agencies and approved persons carry in granting or denying subsidies, state courts will be able to effectively decide cases involving post-adoption subsidy requests.

Cases like the Nancy G. case suggest that there is a need for training programs for pre-adoptive and post-adoptive parents that not only include counseling and guidance in completing the adoption, but also educate parents on the impact that statutory laws may have on their legal recourse. For example, parents would learn what constitutes "placement" under their states' statutes and how to protect themselves in working with more than one agency. When this type of pre-adoptive training is included in parents' education, all the parties - the parents, the adoption entities, and the adopted child - are all on the same informational playing field.

In a previously submitted comment on April 2, 2001 by the Parent Network for the Post-Institutionalized Child ("the Network"), Thais S. Tepper addresses comments to Section 203(b)(1)(A)(iii), which state that information included in pre-adoptive training should come from the adoptive parents themselves. Network comment at 3. Several other submitted comments also address "Adoption Playgroups" as helpful resources of information and support. In a personal testimony, one comment recounts the trend of adoption fraud and unsuccessful attempts to adopt. The second paragraph of the comment makes reference to "Adoption Playgroups" formed for adoptive families. These groups are often formed independently by adoptive parents to help meet the special needs of both the children and their families, not supported nor affiliated with an adoption agency.

The system of "adoption playgroups" can be renamed as "informational entity support groups" and would be a welcome and beneficial addition to the training programs. The final rule will be more effective if it can offer practical advice in a group setting for pre and post-adoptive parents working with the same adoption entity. Not only will parents and children benefit from each other's advice and experiences, but adoption entities seeking to become accredited and approved will benefit as well. Parents and children can provide first-hand experience of successful adoption, relate unsuccessful adoption attempts, and provide suggestions to entities.

Communication is the key to the success of the proposed rules. Informational entity support groups can address prospective adoptive parent education while enhancing communication between adoption agencies/person and parents. The informational support groups can include prospective parents seeking to adopt a child, parents who have completed adoptions, agency employees, and accrediting entity representatives. Building upon the model of the adoption playgroup, the informational support groups offer an organized framework for parents and children affiliated with adoption agencies.

II. Difficulties Facing Prospective Parents in Accessing Information Regarding Non-Conforming Entities and Unethical Behavior Taking Place Within Those Entities.

"Subpart M - Dissemination and Reporting of Information by Accrediting Agencies" covers the disclosure of information to the public regarding accredited agencies and approved persons. Although I agree with the proposed rule that the information must be made to "the public on a quarterly basis," I had difficulty understanding exactly how this disclosure of information will occur. (Subpart M, Sec. 96.91(a)).

A. The Prospective Parent's Point of View

1. Full Disclosure of Accredited Agencies and Approved Persons

It is clear that prospective parents are eager to find a child and take that child home as soon as possible. From the moment the parents enter the premises of the accredited agency

or approved person, the agency or person should hand parents the information required in "Subpart M - Dissemination and Reporting of Information by Accrediting Agencies." This information should appear in the same binder of information containing the details about the children placed by the agency or person. Parents must be able to make an informed decision as to whether they will work with a particular agency or person. Immediate disclosure ensures that prospective parents will be able to decline to work with an agency or person before they have formed a bond with a potential adoptive child. Accredited agencies and approved persons must also view this bond as a source of grief adoptive parents seek to avoid. Thus, the proposed rules should speak to this as well. Several comments speak candidly about the lost referral of children. The couple to whom I referred in my opening paragraph also highlights the need for timely reporting of prior complaints against the agency or person.

The agency or person must act quickly once the prospective parents have accepted a referral to adopt a child. Reporting of past complaints must occur before the parents choose a name for their child - and perhaps the accredited agency or approved person should counsel the prospective parents as to when they should name their adoptive child. Once naming takes place, the child is no longer a nameless, faceless little person parents are bringing into their home. That child becomes a member of the family. "When you lose this child, who has become a member of your family, there is a grieving process similar to that of experiencing the death in a family." Hoppenhauer comment at 3 (emphasis in original). Therefore, the sooner the accredited agency or approved person discloses information regarding complaints filed against it, the sooner prospective parents will be able to protect themselves from the emotional wounds adoptive parents may suffer.

It is necessary that the proposed rules include provisions requiring agencies and persons to provide education to prospective parents regarding the filing of complaints. Parents need to be informed as to the methods for filing complaints against the adoption facility and filing complaints to the Secretary of State. Prospective adoptive parents must remain informed as to the procedural steps required to obtain legal recourse for damages arising out of an adoption action.

The personal account of my family friends who left behind their child in Estonia emphasizes the need for adoption agencies and persons to stress early and often that parents need education as to how to take the appropriate steps to filing a complaint. My family friends were not informed as to what legal recourse was available until after they came face-to-face with this tragedy. They retained a private attorney subsequent to leaving Estonia; therefore, they had received no education by the particular adoption facility. The proposed rules should include provisions requiring agencies seeking accreditation and persons seeking approval to educate parents before they complete the formal adoption process. Adoption facilities should guide parents step-by-step through the process necessary for filing complaints. Though the informational entity support groups will inevitably address the issue of filing complaints, agencies and persons should be required to set up and maintain classes for parents seeking to adopt a child. Though parents must remain responsible for attending the classes, the adoption agency or person should bear the initial burden of providing the education necessary for parents to act in an informed manner.

2. Reporting prior complaints to prospective parents

The proposed rules should include a provision stating that adoption entities must disclose, pre-referral, not only any adverse action taken by the Secretary, but disclose any complaints directed against the entity itself. In addition, the binder should include the procedure for filing a complaint with the agency or person and for filing with the Secretary. Requiring such disclosure will prompt the entities to take corrective action regarding complaints and allow them to publish the corrective action in the binder as well.

In its comment addressing "The Hague Convention Regulations Project Acton Burnell, Inc.", the Child Welfare League of America (CWA) recommended that "a process needs to be set up for families to report problems so that they may be addressed. Families should be notified in writing prior to the adoptive placement that they may file a complaint with the Office of Children's Affairs, Department of State, and the procedure for doing so." CWA comment at 4. The CWA points out a very

practical problem with the proposed rules implementing the IAA.

B. The Accredited Agency/Approved Person's Point of View

Not only do prospective parents have an interest in obtaining information regarding non-conforming entities, unethical behavior, and complaints filed against such entities, but the accredited agencies and approved persons also have a vested interest in making sure prospective parents obtain such information. Informed prospective parents can make choices that decrease the chances that adoption entities will face adverse action by the Secretary. Perhaps those people who are implementing the proposed rules would find it beneficial to gain access to "Adoption Playgroups." Entities can take the next step and establish informational entity support groups based on this model, re-named "informational entity support groups." Members of the groups will benefit greatly from the information relating to disclosure of complaints and unethical behavior. Even before prospective adoptive parents begin the adoption process, they will be well-equipped with information as to how to file complaints and enter into a contractual relationship with an entity whose history is not a mystery. Entities that have an especially good history will make themselves more attractive to prospective adoptive parents, advertising themselves in the best way.

Not only should the rule-makers gain access to the "Adoption Playgroups" and construct their own informational groups, but accredited agencies and approved persons should also take note of their existence and potential use in counseling prospective adoptive parents. One possible way of utilizing the "Adoption Playgroup" idea is for agencies and person to organize prospective parents into groups once parents accept a referral. They could meet on a regular basis, discuss the adoption process, and form connections with parents using the same agency/person. These parents would also be an excellent resource for getting feedback so that agencies and persons can avoid possible complaints in the future.

III. The Absence of Regulations Regarding "Excluded Adoption Services" Will Negatively Affect the Impact of the Proposed Rules.

Section V., C(3) contains a sub-sub-section (e) that addresses activities that do not require accreditation, approval or supervision. The list includes the following adoption activities: (1) completion of a home-study or child background study; (2) the provision of child welfare services where the agency or person is not performing any other adoption service in the case; (3) the provision of legal services where the agency or person is not performing any adoption services in the case; and (4) activities undertaken by prospective adoptive parents on their own behalf. Although not every adoption activity can fall under the scope of the proposed rules, the first exclusion - "completion of a home study or child background study" - must require accreditation and approval. The home study or child background study should be removed from the list of activities that do not require accreditation, approval or supervision.

"[T]he performance of a home study or child background study, by itself does not require the agency or person to be accredited, temporarily accredited, or approved or operate under the supervision and responsibility of primary providers, where the agency or person is not performing any other adoption service (as defined) in the case." (Pub. L. 106-279, 3(3) and 201(b)(1)). Once an agency or person takes on the responsibility to perform the home study or child background study, that agency or person has become involved in a contract for which they can be held liable. Though it is true that performing this one adoption activity, by itself, appears meager in comparison to the other adoption activities which require accreditation or approval, the background studies can be the deciding factor for both the birth parents and the prospective adoptive parents. This reliance is evidence in the story of my family friends who relied on the "child background study," only to arrive in Estonia to find a brain-dead infant who in no way resembled the child described in the background study. If prospective parents testify that they rely on the studies, these adoption activities should not be an excluded activity in the final rule.

Similarly, birth parents might also rely on home studies conducted by an agency or person in deciding whether to agree to the intercountry adoption. Birth parents, like prospective adoptive parents, have an emotionally challenging decision to face in contemplating whether to give up their child to be raised by someone else. If home studies are designated as "excluded adoption activities," birth parents will be left without the assurance that the rules implementing the Hague Convention of 1993 apply to the agency or person handling the adoption process.

IV. Communication Between Accrediting Entities and Agencies/Persons Seeking Accreditation/Approval Can be Facilitated by an Appointed Representative From Each Accredited or Approved Entity.

Subpart I addresses "Routine Oversight by Accrediting Entities." Accredited entities take responsibility for overseeing accredited agencies and approved persons. The proposed rules require an annual monitoring that covers review of complaints in accordance with Subpart J ("Oversight Through Review of Complaints"). Although the accrediting entity may conduct random site visits, it is not required to do so. Annual monitoring, at least in the beginning stages of the accreditation process, would be inadequate to support the agency or person seeking accreditation or approval. Implementing rules that are complex and interconnected; thus, they require ongoing communication between the accrediting entities and those agencies/persons seeking accreditation/approval.

Accrediting entities could facilitate ongoing communication by maintaining contact with a representative from the agency or person. This representative could be selected by the agency or person itself if the agency/person so chooses. Communication can take place in the form of phone calls, electronic mail, and formal visits. Random visits should be mandatory.

Communication can also be facilitated by allowing the appointed entity representatives to communicate with the informational entity support groups. During such communication, entity representatives can receive honest responses to their questions and parents and children can also ask questions of the representative. In allowing the entity representatives to

access informational entity support groups, the representatives will become aware of the real concerns and problems facing the people these proposed rules are designed to protect - the parents and the children.

Though communication between appointed entity representatives and informational entity support groups will provide great assistance to agencies and persons, confidentiality remains a concern. Parents should feel free to express their concerns to entity representatives, and representatives must respect parents' requests for their statements and questions to remain confidential. With their permission, however, appointed entity representatives should disclose specific concerns and questions to the agency/person seeking accreditation/approval.

V. Safety Concerns for Prospective Adoptive Parents Traveling Abroad

Though several foreign countries provide escorts who accompany adopted children overseas to the United States to be met by their adoptive parents, a number of countries do not provide this service. In a comment written by Ms. Rachel Bouman of the University of the Pacific, McGeorge School of Law, Bouman notes that China does not provide escorts to travel with Chinese children to the United States to meet with their adoptive parents; rather, parents seeking to adopt a child must travel to China. After prospective parents obtain a letter of approval they are permitted to travel to the location in China where the Children's Welfare Institute is located. The prospective American parents are required to register with the department of civil affairs in the province in which the child is located. Safe traveling is an issue that the proposed rules must speak to directly.

Subpart C - Accreditation and Approval Requirements for the Provision of Adoption Services - does not explicitly address safety travel standards as a prerequisite for accreditation and approval of agencies and persons. The proposed rules appear to leave this matter to be negotiated between agencies and persons and their insurance carriers. The language of the rules reads, "The Department recognizes that these standards allocating legal risk, mandating insurance coverage, and setting the floor amount of one million dollars for insurance coverage are sensitive and

will require changes in current insurance practice." Though it is true that insurance carriers and the adoption entities must negotiate the terms and conditions of their respective contracts, the rules must also ensure that adoption entities engage in a dialogue concerning the issue of safe traveling with those people who are directly affected by it - the prospective parents and the adopted children.

Disclosure of information relating to traveling to and within foreign countries must occur between the agency/person and the prospective adoptive parents who will be traveling abroad to pick up their child. Insurance contracts aside, the rules should require that agencies and persons seeking accreditation and approval must provide information to parents regarding their safety in foreign countries. Specifically, agencies and persons must provide parents with the basic steps for maintaining safe travel in the countries specifically working with the adoption agency/person. Inevitably, certain safety steps will vary from country to country; however, it remains the duty of the agency/person facilitating the adoption to provide up-to-date information to parents traveling abroad.

If the agency or person already has the informational entity support groups in place, they can utilize the groups as a means of communication. For instance, parents who are planning to adopt a child from China will have access to information provided by the agency or person regarding traveling in China. The prospective adoptive parents will also have the support of the other parent members, some of whom may have traveled to China for a previous adoption.

CONCLUSION

The rules proposed by the U.S. Department of State address the arena of international adoption in ways that are necessary for the United States to ratify its signature to the 1993 Hague Convention regarding intercountry adoption. Though the proposed rules address process for accreditation and approval of adoption entities, they can be strengthened by addressing parent education, access to information, regulated activities, and safe travel. Informational entity support groups would add a meaningful and efficient structure of communication between parents and entities. The groups would provide a safe

environment to voice concerns and file complaints. The groups also allow entities seeking accreditation or approval to access crucial feedback from parents and agency employees. Furthermore, these groups would foster valuable communication among accrediting entities and agencies/persons seeking accreditation/approval. As the United States ratifies its signature to the 1993 Hague Convention, an unknown number of pre-adoptive parents will be spared the heartbreak that former parents have faced. Thank you for your consideration in reading my comment.